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NO. 84-55

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE TO SUGGESTION OF MOOTNESS

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LEGISLATIVE HISTORY

Respondent submits that, in addition to those portions of the Amendments and the legislative history quoted in Petitioner's Suggestion of Mootness, other portions of the legislative history are significant in interpreting the Longshore and Harbor Workers' Compensation Act Amendments of 1984.

Original Senate Bill 38 contained the following wording which would have legislatively mandated the distribution scheme proposed by Petitioner, i.e. priority would have been given to the stevedore's lien:

(2) Any amount recovered by the person entitled to compensation on acount of the proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g), shall be distributed as follows:

(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of—

(i) the cost of all benefits furnished to the person by the employer under section 7; and

(ii) all other amounts payable as compensation or benefits under this Act.

(B) The person entitled to compensation or the person's representative shall retain the amount remaining after the payment required by subparagraph (A).
S. 38, 98th Cong. 1st Sess, 129 Cong. Rec. S8658 (1983).

This provision was rejected by the House of Representatives and replaced with the following language which would have required subtraction of attorney fees, expenses of the suit, and a payment of a 15 percent portion of the judgment to the longshoreman before payment of the compensation lien:

(f)(1) If a person entitled to compensation under this Act institutes a proceeding within the period described in subsection (b) and recovers by a judgment an amount in the proceeding against a third party, the person instituting such proceeding shall be permitted to retain an amount equal to 15 per centum of (A) the amount so recovered, minus (B) the expenses incurred by such person in respect to such proceeding (*including a reasonable attorney's fee*)....

> (3) The balance, *if any*, of the amount recovered (*after the deduction required by paragraph (1) and the expenses described in clause (B) of such paragraph*) shall be distributed as follows:
>
> (A) there shall be paid to the employer from such balance an amount equal to the sum of the costs of all benefits and compensation actually furnished to the person.... S. 38, as amended, 98th Cong. 2nd Sess, 130 Cong. Rec. H2484 (1983). (emphasis added)

The Joint Explanatory Statement of the Conference Committee, as well as the final wording of the Amendments has already been quoted in Petitioner's suggestion.

A summary of the conference committee's substitute is contained in the House proceedings. It states in pertinent part:

> Clarifies priority of distribution of third party awards where the employee brings the action, *adopting current law with respect to the priority but permitting a judge to consider reasonableness of attorney fees.* 130 Cong. Rec. H9736 (1984). (emphasis added).

Just before the Senate's adoption of the Conference Committee Report, Senator Nickles gave an extensive explanation of the intent of the Amendments:

> **THIRD PARTY ACTIONS BY EMPLOYEES**
>
> The Senate bill amended section 33(f) to establish that compensation paid by an employer shall be a first lien on any proceeds obtained by an employee in a tort suit against a third party.

Implicit in this proposal was that the legal expenses of the employee, including attorney fees, would be totally subordinated to the compensation lien. The House amendment essentially reversed the order of priority. It would have permitted the employee to pay his attorney fees and litigation expenses first, before satisfaction of the compensation lien. This would be important where an employer's lien equalled or exceeded the amount recovered in the third party action. The House committee was concerned that an employee might conceivably be worse financially after incurring the expense of a suit than if he never had brought an action at all. In addition, the House committee believed that the employee was entitled to shelter a portion of recovery [15 percent] from any compensation lien. That committee viewed the 15 percent set-aside as comparable to the employer's right under section 33(e)(2) to retain 20 percent of any recovery in excess of litigation expense and compensation liability.

The conference agreement adopts a middle ground. First, it rejects the 15 percent set-aside in the House amendment and modifies current law by eliminating the employer's 20 percent set-aside in section 33(e)(2). *Second, it requires that the employee's litigation expenses including reasonable attorney fees, be paid out of any recovery prior to the satisfaction of the compensation lien.* It should be stressed though how this rule has special application in the cases where the aggregate of the litigation expenses, the employee's legal fees, and the compensation lien leave the employee with little, if any, recovery. *In such circumstances, the conferees found merit in the approach articulated by the court in Ochoa v. Employers National Insurance Company,* 724 F.2d 1171 (5th Cir. 1984). That case held that where an employee's third party recovery was insufficient to cover both his attorney fee and

> the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney fees, were subtracted. The court of appeals emphasized that only reasonable attorney fees were allowed. Thus, where the recovery is insufficient to cover both the attorney fees and the compensation lien, leaving the employee with nothing, the court must evaluate the reasonableness of the fees and make an equitable adjustment as between the employee and his attorney. As noted in *Ochoa*, this approach attempts to do justice to the employee while upholding *Bloomer v. Liberty Mutual Life Insurance Company*, 445 U.S. 74 (1980), which forecloses an adjustment of an employer's lien in order to underwrite the attorney fees of the employee. 130 Cong. Rec. S11,626 (1984) (remarks of Sen. Nickles). (emphasis added)

An implicit assumption of Petitioner's Suggestion of Mootness is that the Longshore and Harbor Workers' Compensation Act Amendments of 1984 are applicable to the instant case. The applicability of the Amendments is clear from their wording:

> Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Act of Sept. 28, 1984, Pub. L. No. 98-426, Sec. 28(a), 98 Stat. 1639.

ARGUMENT

While admitting that the Congress clearly intended to adopt the approach of the Fifth Circuit in the case below,

Petitioner argues that, since the amendments did not change any wording of the Act regarding distribution of proceeds of recoveries from third parties, then the Act's meaning has remained unchanged: "It is that amendment, not the Committee report, which necessarily governs the rights of past and future litigants."

If the Congress intended to adopt the Fifth Circuit's approach in *Ochoa*, below, then why was there no wording to that effect in the amendments themselves? The obvious answer as shown by the history is that the legislators viewed the rule adopted in this case below as the current law. There was no reason for the Amendments to explicitly adopt the current construction of the Act. An additional, very strong indication of Congressional intent is that the provisions of the original senate bill which would have adopted Petitioner's construction of the act were explicitly rejected by the Congress.

In *Bloomer v. Liberty Mutual Life Insurance Company*, 445 U.S. 74, 100 S.Ct. 925 (1980), this Court spent page upon page attempting to analyze congressional intent based upon nuances in committee reports and statements in the Congressional Record, even though the 1972 Amendments omitted any mention of the issue of the compensation lien being taxed for attorneys fees. The court stated its interpretation of Congressional inaction:

> Moreover, in 1972 Congress was informed of, but did not alter, the uniform rule that the longshoremen's legal fees would be paid by the longshoreman alone. In these circumstances we are reluctant to take steps to change that rule on our own. 445 U.S. at 85.

Yet under almost identical circumstances, Petitioner is asking the Court to dismiss overwhelming evidence of Congressional intent merely because no new wording was added.

CONCLUSION

For the foregoing reasons, Respondent submits that the Congress has made clear its intent to legislatively enact the approach adopted in the Fifth Circuit in this case below, and that such enactment rendered this case moot.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above Response to Suggestion of Mootness were served upon counsel for petitioner, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 5th day of December, 1984.

MICHAEL R. GUIDRY